

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RANDY COY HENDERSON,

Plaintiff,

vs.

EARNIE CREWS, et al.,

Defendants.

NO. CV-09-5064-CI

**ORDER ADOPTING REPORT AND
RECOMMENDATION AND DISMISSING
FIRST AMENDED COMPLAINT WITHOUT
PREJUDICE**

1915 (g)

Magistrate Judge Imbrogno filed a Report and Recommendation on February 17, 2010, recommending Mr. Henderson's First Amended Complaint be dismissed without prejudice for failure to state a claim upon which relief may be granted. First, Plaintiff's allegations of due process violations failed as the conditions he describes of restricted recreation and the absence of educational, work, and store privileges in administrative segregation did not rise to the level of an "atypical and significant hardship." *Sandin v. Conner*, 515 U.S. 472, 485-87 (1995).

Plaintiff's alleged access-to-court claim also failed as the inability to effectively litigate an appeal to the Ninth Circuit did not demonstrate Defendants' actions prevented Plaintiff from pursuing a non-frivolous legal claim in an initial pleading. See *Lewis v. Casey*, 518

1 U.S. 343, 349, 354 (1996) (holding a prisoner claiming unconstitutional
2 denial of access to the courts must allege actual injury and that the
3 mere inability to litigate effectively is insufficient). Finally,
4 Plaintiff's claim for relief regarding the sanction of an unspecified
5 restitution amount was premature. Mr. Henderson admitted funds had not
6 been withdrawn from his inmate account, and therefore, he had not been
7 deprived of property without due process. See *Quick v. Jones*, 754 F.2d
8 1521, 1522-23 (9th Cir. 1984).

9 There being no objections, the court **ADOPTS** the Report and
10 Recommendation. The First Amended Complaint is **DISMISSED** for failure to
11 state a claim upon which relief may be granted. See 28 U.S.C. §§
12 1915(e)(2) and 1915A(b)(1). This dismissal is **without prejudice** to
13 Plaintiff seeking an appropriate state court remedy regarding the
14 alleged deprivation of good conduct time and a future claim should funds
15 be taken from his inmate account without due process of law.

16 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner
17 who brings three or more civil actions or appeals which are dismissed as
18 frivolous or for failure to state a claim will be precluded from
19 bringing any other civil action or appeal in forma pauperis "unless the
20 prisoner is under imminent danger of serious physical injury." 28
21 U.S.C. § 1915(g). Plaintiff is advised to read the new statutory
22 provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's
23 complaint may count as one of the three dismissals allowed by 28 U.S.C.
24 § 1915(g) and may adversely affect his ability to file future claims.

25 **IT IS SO ORDERED.** The District Court Executive is directed to
26 enter this Order, forward a copy to Plaintiff at his last known address,
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1 enter judgment, and close the file. The District Court Executive is
2 further directed to forward a copy of this Order to the Office of the
3 Attorney General of Washington, Criminal Justice Division. The court
4 certifies any appeal of this dismissal would not be taken in good faith.

5 **DATED** this 8th day of March 2010.

6
7 S/ Edward F. Shea
8 EDWARD F. SHEA
9 United States District Judge

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